IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36080

STATE OF IDAHO,	)	**2010 Unpublished Opinion No. 331**
	)	
Plaintiff-Respondent,	)	**Filed: January 28, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
KATHLEEN ANN BLANC,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Jerome County. Hon. John K. Butler, District Judge.

Order denying motion to correct illegal sentence, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Kathleen Ann Blanc appeals from the district court's denial of her Idaho Criminal Rule 35 motion to correct an illegal sentence. Blanc contends that the district court erred in denying her contemporaneous motion for appointment of counsel. We affirm.

I.

FACTS AND PROCEDURE

Blanc was charged in Jerome County with lewd conduct with a minor child under sixteen. Pursuant to a plea agreement, Blanc pleaded guilty to an amended charge of felony injury to a child in violation of Idaho Code § 18-1501(1). On February 10, 2004, the district court imposed a unified ten-year sentence, with a minimum period of confinement of two years, but retained jurisdiction for 180 days. The district court reviewed Blanc's evaluation after the first period of retained jurisdiction and ordered another 180-day period of retained jurisdiction. After the second period of retained jurisdiction, on January 25, 2005, the district court suspended Blanc's sentence and placed her on probation for five years. Thereafter, Blanc was found in

violation of terms of her probation. On December 20, 2006, the district court revoked probation and ordered execution of the underlying sentence. Blanc appealed, but her appeal was subsequently dismissed on her motion on the ground that it was moot.

On November 19, 2008, Blanc filed a pro se I.C.R. 35 motion to correct what she contended was an illegal sentence. Among other things, Blanc asserted that her sentence was illegal because her sentencing hearing and the first rider review hearing were conducted in Gooding County without her written consent, which she contends was required by terms of Idaho Criminal Rules 19 and 20. Blanc also filed a motion for appointment of counsel and a motion to disqualify the district court judge. In a unified order, the district court denied all three motions. Blanc appeals.

II.
ANALYSIS

On appeal Blanc contends that the district court erred by denying her motion for appointment of counsel. She asserts that the portion of her motion asserting a "jurisdictional defect based on improper venue" presents a viable claim of an illegal sentence and, therefore, counsel should have been appointed to help develop this claim.

A criminal defendant has a right to counsel at all critical stages of the criminal process, including pursuit of a Rule 35 motion. I.C. §§ 19-851, 19-852; I.C.R. 44; *State v. Wade*, 125 Idaho 522, 523, 873 P.2d 167, 168 (Ct. App. 1994); *Murray v. State*, 121 Idaho 918, 923 n.3, 828 P.2d 1323, 1328 n.3 (Ct. App. 1992). Although a defendant has an absolute right to hire his or her own private attorney in a Rule 35 proceeding, appointed counsel at this stage may be denied if the trial court finds that the motion "is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding." I.C. § 19-852(b)(3). Thus, a defendant may be denied appointment of counsel to assist in pursuing a Rule 35 motion if the trial court finds the motion to be frivolous. Whether a motion is frivolous is a question of law that we freely review. *Wade*, 125 Idaho at 525, 873 P.2d at 170.

Here, the district court denied Blanc's motion for appointed counsel because it determined that Blanc's Rule 35 motion failed to assert a viable claim of an illegal sentence and, therefore, the motion was both untimely and frivolous. We agree. At the time of Blanc's motion, Idaho Criminal Rule 35 provided in part:

> The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation. Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction . . . .

Applying the rule, it is clear that Blanc's Rule 35 motion is untimely unless an "illegal sentence" was imposed.

Whether a sentence is illegal is a question of law over which we exercise free review. *State v. Clements*, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009). With regard to what constitutes an "illegal sentence," the function of Rule 35 is narrow. An illegal sentence is one that, from the face of the record, imposes a penalty that is simply not authorized by law. *Id*. at 86, 218 P.3d at 1147. A claim of illegal sentence under Rule 35 therefore does not provide a procedural vehicle to assert other claims of error at trial or at sentencing. *Id.* at 85, 218 P.3d at 1146 (citing *Hill v. United States*, 368 U.S. 424, 430 (1962)). *See also State v. Self*, 139 Idaho 718, 725, 85 P.3d 1117, 1124 (Ct. App. 2003). Here, Blanc's unified sentence of ten years, with a minimum period of confinement of two years, for felony injury to a child is within statutory limits and is not "illegal" as that term is defined in *Clements*. *See* I.C. § 18-1501(1).

Blanc contends, however, that her sentence is illegal because she was sentenced in the wrong county without her written consent in violation of Idaho Criminal Rules 19 and 20. This error, she maintains, created a "jurisdictional defect" making the sentence illegal.

Idaho Criminal Rule 19 provides: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the county in which the alleged offense was committed." In *Housley v. State*, 119 Idaho 885, 889, 811 P.2d 495, 499 (Ct. App. 1991), we held there was substantial compliance with the requirements of I.C.R. 19 where the defendant was charged with a crime that occurred in Cassia County, the criminal complaint was filed in Cassia County, and all judicial proceedings through entry of the guilty plea occurred in Cassia County, but the sentencing hearing was conducted in another county with the same district judge presiding. Blanc's case is indistinguishable from *Housley*. All of Blanc's criminal proceedings occurred in the county of the offense, Jerome County, except the sentencing hearing and the first rider

review hearing, which were conducted by the same district judge but in a different county. As in *Housley*, there was substantial compliance with I.C.R. 19, so no illegality has been shown.

The other rule upon which Blanc relies, Idaho Criminal Rule 20(a), provides in part:

> A defendant arrested, held, or present in a county other than that in which the complaint, information, or indictment is pending against the defendant may state in writing that the defendant wishes to plead guilty to the complaint, information, or indictment which is pending and to consent to disposition of the case in the county in which the defendant was arrested, or is held, subject to the approval of the transfer by the prosecuting attorney from each county involved and the trial court where the case is pending.

In *Housley*, we held that I.C.R. 20 was "inapposite," but did not explain why. *Id.* We do so now. Rule 20 is inapposite because its function is to empower a defendant to initiate the transfer of criminal proceedings to another county where the defendant was arrested, held, or is present. As has been said regarding the corresponding Federal Rule of Criminal Procedure 20(a), the rule is primarily "of benefit to the defendant" in that it "permits a speedy disposition of his case . . . without whatever hardship may be involved in transporting him back to the district in which he is charged," as when the defendant was arrested in his county of residence for a crime committed elsewhere. 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 321, 402-03 (4th ed. 2009). The rule has no application where the defendant made no such request to transfer the proceedings.

Like the defendant in *Housley*, Blanc has shown no violation of I.C.R. 19 or 20, and as in *Housley*, we therefore need not determine whether a violation of either of those rules would create a jurisdictional defect nor whether such a jurisdictional defect, if found, could properly be addressed through an I.C.R. 35 motion for correction of an "illegal" sentence.

Blanc has not shown any potentially nonfrivolous claim that she received an "illegal sentence." Therefore, the district court correctly determined that because an illegal sentence was not involved, Blanc's I.C.R. 35 motion was not timely filed. The district court's order denying Blanc's motion for appointment of counsel and denying the Rule 35 motion is, accordingly, affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**